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COMMITTEE ON GOVERNMENT REFORM

U.S. HOUSE OF REPRESENTATIVES

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Chairman Miller and distinguished Members of the Subcommittee:

Thank you for the opportunity to appear before you today to discuss the Department of Labor's progress in responding to the public's reform nominations that were included in the Office of Management and Budget's (OMB) 2005 report on *Regulatory Reform of the U.S. Manufacturing Sector*.

The Department takes seriously its responsibility to protect worker safety and health, retirement security, pay, and equal access to jobs and promotions. Over the years, advances in safety, health, science, and technology -- as well as changes in the law -- have rendered a number of the Department's regulations outdated or even unnecessary. As a result, these advances have required us to revise or eliminate regulations and to consider and adopt new rules and new approaches that ensure strong protections for workers without imposing unnecessary and costly burdens on the economy.

The Mine Safety and Health Administration (MSHA) and the Occupational Safety and Health Administration (OSHA) each have continuing rulemakings to identify regulations or provisions of regulations that are outdated, redundant, or unnecessary. For example, this past January OSHA published Phase II of its Standards Improvement

Project, which revised or removed a number of health provisions in its standards. OSHA expects these revisions to reduce regulatory requirements for employers without reducing employee protection. As mentioned in OMB's Report on regulatory reform, the Agency is now beginning Phase III, which will address both safety and health topics. OSHA will initiate the project by publishing an Advance Notice of Proposed Rulemaking in the *Federal Register* later this year soliciting input from the public on rules that should be addressed.

The Department recognizes the costs that regulations place on the regulated community, particularly the small business community and small manufacturers. We have pursued alternatives to rulemaking whenever feasible and have attempted to minimize the costs of regulations while ensuring that strong worker protections are in place. For instance, rather than issue a new regulation, OSHA addressed the hazards of metalworking fluids by developing a best-practices guide and making it available on its website. Metalworking fluids are used extensively in manufacturing industries such as automotive, aircraft, farm equipment, marine, industrial engine, heavy machinery, and hardware manufacturing, as well as in machine shops.

The Department also recognizes that employers often need help understanding their rights and responsibilities under federal labor laws and regulations. That's why Secretary Chao launched the Compliance Assistance Initiative in June of 2002. The Initiative aims to provide businesses, employees, unions, and other regulated entities with the knowledge and tools they need to comply with DOL's rules. We understand that before anyone can comply with regulations, the regulations have to be communicated clearly and understood.

Our multi-faceted approach to regulatory reform, compliance assistance, and vigorous enforcement is working. Due in part to these activities, both the rates of workplace fatalities - four deaths per 100,000 workers - and the injury and illness rate - five per 100 workers - are at the lowest levels in OSHA history. In 2003, there were 300,000 fewer injuries and illnesses than the previous year, a decrease of 7.1 percent. In addition, a drop in fatalities among Hispanic workers during each of the two most recent years is particularly encouraging because deaths among this group had been rising every year since 1995. We also are encouraged by the fact that fatal work injuries among foreign-born Hispanic workers declined in 2003 for the first time since the National Census of Fatal Occupational Injuries began. Also due in part to the Department's focus on regulatory reform, compliance assistance, and enforcement, in 2004, MSHA reported the fewest number of fatalities (55) since 1910, when records were first kept. Since 2000, the mining industry has seen a 35 percent decrease in fatal accidents nationwide.

Furthermore, the Employee Benefits Security Administration (EBSA) had its best year ever in FY2004, with a record breaking 121 percent increase in enforcement results that protected $3.1 billion in retirement, health, and other benefits for American workers and their families. In short, the Department's approach to regulatory reform, compliance assistance, and strong enforcement is clearly working.

As this Subcommittee recognizes, one important regulatory tool is the process for addressing the public's reform nominations that are included in OMB's annual Reports to Congress on the Costs and Benefits of Federal Regulations. In considering regulations to promulgate, revise, or withdraw, we evaluate many factors, including input that is received from the public through the OMB nominations process, stakeholder meetings,

industry experience, experience with previous regulatory initiatives in a given area, and alternatives to regulation.

Beginning with its 2001 Report to Congress, OMB solicited suggestions from the public on specific regulations that could be rescinded or changed that would increase net benefits to the public by either reducing costs or increasing benefits. In 2002, OMB expanded its request for reform suggestions to include agency guidance documents and paperwork requirements. In 2004, OMB requested nominations of "regulations, guidance documents or paperwork requirements that, if reformed, would result in substantive reductions in regulatory burden and result in true savings by reducing unnecessary costs, increasing effectiveness, enhancing competitiveness, reducing uncertainty and increasing flexibility." OMB was particularly interested in reforms addressing burdens on small and medium-sized manufacturers.

OMB's 2004 final Report to Congress listed 189 reform nominations from 41 commenters and requested that agencies review and prepare responses for OMB by January 24, 2005. The Department of Labor accounted for 39 nominations. Following discussions with the agencies, including the Department of Labor, and input from the Small Business Administration's Office of Advocacy, OMB published a document in March, *Regulatory Reform of the U.S. Manufacturing Sector*, which included 76 nominations that OMB and the agencies determined have potential merit and justify further action. The Department of Labor accounted for 11 of these reform nominations. (Note that the Family and Medical Leave Act (FMLA) nomination in OMB's March report combined 9 separate nominations addressing FMLA in the 2004 OMB report.)

In addition to FMLA, the 11 Department of Labor reform nominations include recommendations addressing Permanent Labor Certification, and 9 OSHA regulations and guidance documents. In keeping with the subcommittee's request, I will now discuss the Department's progress on each of the nominations.

Permanent Labor Certification. One commenter was critical of the current process for certifying the unavailability of U.S. workers for positions for which foreign nationals are sponsored, stating that the "process is time-consuming, expensive, and creates uncertainty." The commenter recommended the Department publish final regulations that use a broader approach and streamline the certification process.

The Department's Employment and Training Administration (ETA) published the final Permanent Labor Certification rule on December 27, 2004, with an effective date of March 28, 2005, and has implemented the re-engineered Permanent Labor Certification Program. The new process includes an e-filing capability and through the utilization of technology, has reduced processing times from as long as several years to approximately 60 days for "clean" applications, i.e., those not identified for audit. In addition, ETA has implemented uniform times for recruitment and other notification requirements, thus making the employer application process straightforward, less expensive, and more customer friendly.

Coke Oven Emissions Standard. Two commenters recommended that OSHA update its coke oven emission standard.

In January of this year OSHA published Phase II of its Standards Improvement Project, which streamlined several provisions of the coke oven emissions standard. For example, OSHA reduced the frequency of medical monitoring for certain employees

from semi-annually to annually after determining that medical evidence did not support the need for semi-annual monitoring. As I mentioned earlier, OSHA has added a third phase of the Standards Improvement Project to its regulatory agenda, and expects to publish an advance notice of proposed rulemaking later this year to solicit input from the public on other provisions that may be appropriate to address in this process.

Hazard Communication/Material Safety Data Sheets (MSDS). Several commenters stated that MSDSs should be prepared using a consistent format and that the quality of information needed to be improved.

OSHA is preparing proposed guidance for the preparation of MSDSs that will be posted on the Agency's Web site for comment in 2005 and will be completed in 2006. In addition, OSHA has added to the spring 2005 regulatory agenda the possible modification of the Hazard Communication Standard to be consistent with the Globally Harmonized System of Classification and Labeling of Chemicals. This global approach to hazard communication includes a format for safety data sheets as well as standardized label requirements. OSHA also is preparing an enforcement initiative to address MSDS accuracy issues.

Annual Training Requirements for Separate Standards. One commenter observed that OSHA has separate annual training requirements for a number of standards. The comment also pointed out that the Environmental Protection Agency (EPA) includes training requirements for a number of regulations that are not always compatible with OSHA requirements. The comment recommended that the Agency develop a single integrated training program.

As required in OMB's 2005 report, the Department provided OMB with a report on training requirements in May 2005. The report noted that OSHA does not require separate training programs for each standard that requires such training. The report also noted that OSHA has sought to avoid duplication of EPA's training requirements on subjects where both agencies have jurisdiction. Employers are permitted to organize and present training in whatever manner is most effective for the workplace involved. In order to further clarify training requirements and assist employers, OSHA plans to revise and update its publication, *Training Requirements in OSHA Standards and Training Guidelines*, before the end of 2005. This publication summarizes the major provisions for training and includes the Agency's voluntary training guidelines. These guidelines help employers design, implement, and evaluate their training programs to ensure they are effective.

Hazard Communication Training. One commenter stated that draft guidance OSHA made available for comment in 2004 on information and training requirements under the Hazard Communication Standard was too complicated for small businesses. The commenter recommended that OSHA develop a simplified approach.

OSHA anticipates finalizing the draft guidance in 2005, and expects to include a simplified approach as recommended.

Hexavalent Chromium. Two commenters urged OSHA to minimize the impact of its final Hexavalent Chromium standard on small business.

OSHA was first petitioned to revise its Hexavalent Chromium standard in 1993. The Agency was subsequently sued for unreasonable delay. In 2002, the U.S. Court of Appeals ordered OSHA to proceed expeditiously with rulemaking, and established a

timeline for publication of a proposed rule and a final rule. In accordance with the court order, OSHA published a proposed rule on October 4, 2004. The Agency must meet a court-ordered deadline of January 18, 2006 for publication of the final standard.

The Hexavalent Chromium rulemaking is very complex, involving significant data collection efforts, a major risk analysis and a comprehensive economic analysis. The Agency is very much aware of the concerns of small business and other stakeholders. OSHA conducted a SBREFA (Small Business Regulatory Enforcement Fairness Act) panel review to focus on small business concerns prior to publishing the proposed rule and received comments from many small business representatives at public hearings held this past February.

Although under a tight deadline to complete the final rule, I can assure the committee that OSHA will observe all of the requirements applicable to the regulatory process, and will consider the issues raised by all commenters as it develops the final rule.

Sling Standard. Two commenters recommended that OSHA update the sling standard to reflect the American Society of Mechanical Engineers consensus standard. OSHA has studied this issue and concluded that most types of slings that meet the most recent edition of the American Society of Mechanical Engineers national consensus standard on slings are in full compliance with the existing OSHA sling standards. Current OSHA policy treats any deviation from the Agency's sling standards as a *de minimis* violation if the sling otherwise meets the current consensus standard and is at least as effective in protecting workers. In fact, OSHA does not assess penalties for *de*

minimis violations. Thus, newer types of slings not addressed by the Agency's standard are effectively compliant if they meet the national consensus standard.

OSHA plans to update the sling standard as part of its regulatory project to update standards that are based on national consensus standards. The sling standard will be part of a later phase of the project, for which the Agency has not yet projected completion dates. OSHA is developing a guidance document on the selection and use of slings, which it plans to issue by February 2006. This document would make it clear, without rulemaking, that slings meeting the newer ANSI/ASME standard are acceptable.

Guardrails Around Stacks of Steel. One commenter objected to OSHA's requirement to provide either guardrails or tie-off protections to workers who must perform their duties 48 inches or more above the ground. The commenter asserted that the requirement is infeasible for operations that exist in steel and steel product companies where individuals need to stand on "stacks" of product to rig bundles for crane lifts.

As required in OMB's 2005 manufacturing report, the Department provided OMB with a report on this item in May 2005. OSHA is currently conducting a rulemaking on its Walking and Working Surfaces standard, and will consider the guardrail requirement as part of that rulemaking.

Walking and Working Surfaces. One commenter stated that OSHA regulations under some circumstances require the use of fixed ladders when spiral stairways or ship stairs would be safer.

As required in the 2005 OMB manufacturing report, the Department provided OMB with a report on this item in May 2005. This issue also will be considered as part of OSHA's rulemaking on the Walking and Working Surfaces standard.

OSHA Flammable Liquids. Two commenters recommended that OSHA update the current rule, which cites the 1969 National Fire Protection Associations standards for spray application of flammable and combustible liquids, to reflect current technology.

OSHA intends to include the flammable liquids standard in its ongoing regulatory project to update standards that are based on national consensus standards. However, the Agency has not yet determined when flammable liquids will be considered.

Family and Medical Leave Act. Many commenters recommended changes to the FMLA regulations.

The final FMLA regulations were published in 1995. Since then, as employers have attempted to implement the regulations and employees have attempted to utilize FMLA benefits, the Department has received feedback suggesting possible revisions to the regulations, including the nominations for reform submitted to OMB in 2004. The FMLA regulations were also the subject of many reform recommendations in OMB's previous rounds of public nominations for reform in 2001 and 2002. In addition, Congress has held a number of hearings over the years at which stakeholders identified the positive attributes as well as possible difficulties with these regulations. Furthermore, federal courts - including the United States Supreme Court - have invalidated several provisions of the FMLA regulations.[1]

[1] For instance, the U.S. Supreme Court invalidated an FMLA regulation that required an employer to designate the leave taken by employees as FMLA leave or else be prohibited from counting it against an employee's 12-week FMLA entitlement. *See Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81 (2002). In addition, a number of appellate courts have stricken another FMLA regulation that requires employers to

The Department intends to consider carefully the court decisions, the public's views, and the Agency's experience administering the regulations before deciding what action, if any, is appropriate to take.

Madame Chairman, the Department is proud of its achievements in streamlining its regulations since 2001. In doing so, we have provided clarity for employers, workers, and the public at large. We value the important input we received from the public during the rulemaking process, OMB's reform nominations process, and through other outreach efforts. While progress has been made, we recognize more needs to be done. We are dedicated to reducing the regulatory costs and burdens for employers, which will help employers to create jobs, while at the same time continuing our commitment to strengthen protections for the American workforce.

Madame Chairman, this concludes my testimony. I would be glad to respond to any questions you may have.

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treat certain employees as eligible for FMLA leave, even though they do not meet the FMLA's eligibility definition. *See, e.g., Dormeyer v. Comerica Bank-Illinois*, 223 F.3d 579 (7th Cir. 2000).